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No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the Supreme Court of Mississippi

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

Do Mississippi Courts have jurisdiction over adoptions of Indian children whose natural parents are residents of and domiciled on an Indian Reservation?

A. Does a state court requirement of physical presence within and parental consent to children's acquisition of their parents' residence and domicile unlawfully infringe upon the special federal/tribal relationship reflected in the ICWA when applied to Indian children of reservation parents?

B. Does the definition of residence or domicile of Indian children for purposes of the Indian Child Welfare Act turn on a state or federal definition?

LIST OF PARTIES

The Appellant is the Mississippi Band of Choctaw Indians, an Indian Tribe duly organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 48 Stat 986, 25 U.S.C. § 467. Respondents are all individual persons.

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ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi (JS. App. E, pp. 11a-18a) is reported at 511 So.2d 918 (Miss. 1987). The Opinion of the Chancery Court of the First Judicial District, Harrison County, Mississippi (JS. App. 10a-11a) is not reported.

JURISDICTION

This Court is believed to have jurisdiction as an appeal pursuant to 28 U.S.C. § 1257(2) and/or as a

Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. 2103. In its order of April 23, 1988, the Court postponed the question of jurisdiction, so it is briefed below under Argument Part I. In the alternative, the Court is requested to take jurisdiction over the case on certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C.§ 2103. The judgment of the Supreme Court of Mississippi was entered on August 5, 1987, *rehearing denied*, September 16, 1987. A Notice of Appeal to this Court was filed with the Supreme Court of Mississippi on December 14, 1987, and the appeal was docketed on December 15, 1987.

LAWS INVOLVED

The following are set out in the Appendix to this brief:

1. The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, 1902, & 1911.

2. Mississippi Adoption Act § 93-17-3, Mississippi Code Annotated of 1982, as amended.

STATEMENT

This is an action by an Indian tribe seeking to have a state adoption decree vacated and set aside for want of jurisdiction because the twin Mississippi Choctaw infants who were the subject of this adoption by a non-Indian couple were the natural children of Indian parents who both were at all times relevant to these proceedings residents and domiciliaries of the Choctaw Indian Reservation in Mississippi.

Appellant Mississippi Band of Choctaw Indians is a federally recognized Indian tribe in the State of Mississippi. On March 31, 1986 Appellant filed a Motion to Vacate and Set Aside the Final Decree of Adoption in a state adoption proceeding of twin Mississippi Choctaw infants by a non-Indian couple. Both the natural mother and the putative father are full-blooded Mississippi Choctaw Indians enrolled at the Federal Indian Agency at Philadelphia, Mississippi, and are residents of and domiciled on the Choctaw Indian Reservation. The adopting non-Indian parents reside in Harrison County, Mississippi about 200 miles south of tribal headquarters. Mississippi is a non-Public Law 280 State and the federal/tribal jurisdiction over the Choctaw Indian Reservation was recognized by this Court in *United States v. John*, 437 U.S. 634 (1978).

B.B. and G.B. are Choctaw Indians of the full blood and eligible for enrollment in the Mississippi Band of Choctaw Indians[1]. They were born unto J.B., their natural mother on December 19, 1985 in Harrison County, Mississippi where the mother had travelled to give birth. A Consent to Adoption was executed by J.B. on January 10, 1986. The Consent to Adoption by the putative father, W.J., was executed on the 11th day of January, 1986, but was not certified by the Judge until June 3, 1986, long after the May 21st, 1986 hearing date on Appellant's Motion.

The Decree of Adoption was rendered on the 28th day of January, 1986.

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[1] Appellees have acknowledged both the children's Indian blood quantum and their eligibility for enrollment in the Mississippi Band of Choctaw Indians at P. 3 of their Motion to Dismiss Appeal and to Deny Petition for Writ of Certiorari.

Appellant Mississippi Band of Choctaw Indians, which had at no time been notified or served with process, filed its Motion to Vacate and Set Aside the Final Decree of Adoption on March 31, 1986. After the motion was filed and heard on May 21, 1986, another affidavit was given by the natural mother, J.B., and filed June 9, 1986. A Reaffirmation of Consent of Adoption was filed by W.J., putative father, on June 9, 1986. The Harrison County Chancery Court entered its Opinion overruling the motion on July 14, 1986, and a Decree was entered on July 30, 1986.

Appellant opposed the adoption petition filed by non-Indian Petitioners Orrey Curtiss Holyfield and Vivian Joan Holyfield in the Chancery Court of Harrison County, State of Mississippi by filing a Motion to Vacate and Set Aside the Final Decree of Adoption. (JS. App. B) The Motion asserted that the minor children of the natural mother residing on the Choctaw Indian Reservation were subject to the exclusive jurisdiction of the Mississippi Band of Choctaw Indians Tribal Court under preemptive federal law. Those laws were enacted to protect the tribe and its members from assertions of state jurisdiction concerning matters arising on the Choctaw Reservation. 25 U.S.C. § 1911(a).

After briefing and argument the Chancery Court for the First Judicial District of Harrison County, Mississippi decided it had jurisdiction to decide these adoption proceedings. Its judgment is set forth in JS. App. C and its Opinion in JS. App. 2. The court found that the Indian Tribe never obtained exclusive jurisdiction over the children because they were born outside the confines of and had never resided on or been physically on the Choctaw Indian Reservation.

Appellant prosecuted an appeal to the Supreme Court of Mississippi, which affirmed the adoptions and issued the Opinion reproduced in the Appendix E to the Jurisdictional Statement. Appellant maintained on appeal that federal statutes, i.e., The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; the United States Constitution, Art I, Sec. 8, Cl 3; and the laws of the United States established principles, which were preemptive of state jurisdiction. *United States v. John* 437 U.S. 634 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). The essential basis of the Mississippi Supreme Court's Opinion was that minors do not acquire the legal residence and domicile of their parent(s) in the absence of the child's actual physical presence in such location and if to do so would be contrary to the parental desires. The ruling, as applied to Indians, constitutes an infringement by the State of Mississippi in the historical and federal statutory exclusive jurisdiction the Appellant tribe possesses in regulating the domestic relations of its members and residents.

SUMMARY OF ARGUMENT

No. 87-980 meets the statutory requisites for an appeal under 28 U.S.C. § 1257(2). This court has reviewed many cases where federally-protected Indian rights were denied by state courts by writ of error and by the modern appeal procedure. Furthermore, the other requisites of jurisdiction on appeal are clearly met. Alternatively, review would nonetheless be appropriate under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

Exclusive tribal court jurisdiction over these adoptions is grounded in the express language of the In-

dian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. §§1901-1963, and more specifically in subsection 101(a) of the law, 25 U.S.C. §1911(a). The legislation is designed to comprehensively provide protections to Indian families and their tribes against the proliferation of wrongful removals of their children from their homes and their culture. Congress enacted this law as a response to the alarmingly high rate of Indian family break-ups, often unwarranted, and adoptions by non-tribal public and private agencies and out of a perceived failure on the part of the states to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families. The legislation codifies an expansive tribal jurisdiction basis in adoption, removal and termination proceedings. As pertains to exclusive tribal court jurisdiction over Indian children resident and domiciled on the reservation, the Act embodies the conclusion suggested by and consistent with numerous decisions of this Court and the intent of Congress as indicated through the legislative history.

By contrast, the decision below seeks to carve an exception to this jurisdictional statute based on an imputation of special state requirements for residence and domicile which would render a major protection of the Act largely powerless. The ruling below substitutes a factual determination for a legal conclusion; disregards its own precedent; ignores rulings of this Court which have previously expressly renounced applications of state criminal laws upon the Choctaw reservation and disregards precedents of this Court extending the ruling to applications of state civil laws. To the extent it constitutes a "subject matter" as

opposed to a"territorial" jurisdictional determination it violates this Court's "infringement doctrine" and ignores the tribal sovereignty of Appellant. By an alternative approach based on a common law application of abandonment, it cannot be sustained in light of 25 U.S.C. § 1913(c) and, in any event under case rulings of other courts interpreting same, would have to give way in its application under a federal preemption analysis.

Application of states' residence and domicile standards would, as here, produce discriminatory effects on reservations, could result in a multiplicity of standards on a single reservation and would undermine a nationwide rule of law. This Court has recognized that local rules cannot be used or implemented to defeat federal statutes and the definition of residence and domicile of Indian children for purposes of the ICWA can only turn on a federal rather than a state definition. No reason exists to apply a state rule of state residency and domicile to a federal law on reservation residency and domicile and the results would be troublesome and should be rejected.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER 87-980 AS AN APPEAL

In its order of May 23, 1988, the Court postponed the question of jurisdiction in No. 87-980 to the hearing of the case on the merits. 56 U.S.L.W. 3805. In the discussion following, appellant supports jurisdiction over this case as an appeal.

28 U.S.C. § 1257(2) confers jurisdiction over appeals from the highest court of a state "where [there] is drawn in question the validity of a statute of any

state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Involved in the present case is the Mississippi state courts' application of the state adoption statute, Miss.C.Ann. § 93-17-3, to the adoption of twin Indian infants born to Mississippi Choctaw parents, both of whom were residents and domiciliaries of the Choctaw Indian Reservation. Appellant by Motion to Vacate and Set Aside Final Decree of Adoption and on appeal contended that state jurisdiction to apply this adoption statute to these tribal children of reservation parents was preempted by the federal laws governing adoptions and placements of Indian children. (Appellant's contentions will be further elaborated upon in the remainder of this brief.) Appellant has drawn into question the validity of the Mississippi adoption statute as applied to these twin tribal children and has done so on the ground that its application is repugnant to Supremacy Clause of the Constitution, art. VI, § 2 and the court below ruled in favor of the statute's validity.

The Court has held that Section 1257(2) applies to cases where the issue is the validity of a state statute as applied, as well as where the issue is the validity of the statute on its face.[2] The instant cases presents a claim that Mississippi's adoption laws are invalid under the Supremacy Clause whenever applied to Indian children who are deemed by federal law to be resident and domiciled on an Indian reservation apart from state jurisdiction. Appellant's claim is generic

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[2] *Bantam Books v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Fisher v. Kansas* 274 U.S. 380, 385 (1927); *Dahnke Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

and not dependent on the particular form of application of state adoption laws herein and thereby escapes the limitation in two other lines of cases of this court which hold that an appeal does not lie where the claim is of an erroneous exercise of authority under a valid statute,[3] or that an otherwise valid statute is being applied discriminatorily in violation of the Constitution.[4]

This Court has historically reviewed cases on appeal where the federal rights accorded Indians conflicted with state law and a state court had ruled in favor of the state law position. Initially this review was by writ of error, the predecessor to today's modern appeal procedure.[5] In more recent times this Court has accepted jurisdiction on appeal in these case situations.[6] Even though on occasion other such cases

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[3] *Philadelphia & Reading Coal & Iron Co. v. Gilbert* 245 U.S. 162 (1917).

[4] *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182 (1945).

[5] *Sizemore v. Brady*, 235 U.S. 441 (1914); *Choate v. Trapp*, 224 U.S. 665 (1912); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *McKay v. Kalyton*, 204 U.S. 458 (1907); *Spalding v. Chandler*, 160 U.S. 394 (1986); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) (3 cases); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see also *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1859); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857).

[6] *Antoine v. Washington*, 420 U.S. 194 (1975); *Tonasket v. Washington*, 411 U.S. 451 (1973); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Tulee v. Washington*, 315 U.S. 681 (1942).

have been reviewed on certiorari, this appears to be based solely on the election of petitioning counsel.[7]

This case also clearly meets the other requisites of jurisdiction on appeal. There is a final judgment of the highest court of the state; federal questions which were decided by that court are presented; and the questions presented are substantial as ensuing portions of discussions throughout this brief should make clear. Jurisdiction based upon 28 U.S.C. § 1257(2) is therefore properly grounded.

Alternatively, on the basis of the analysis above, review would nonetheless be appropriate under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

II. MISSISSIPPI COURTS LACK JURISDICTION OVER ADOPTIONS OF INDIAN CHILDREN WHOSE NATURAL PARENTS ARE RESIDENTS OF AND DOMICILED ON AN INDIAN RESERVATION.

A. Background to and General Purposes and Provisions of the Indian Child Welfare Act of 1978 Applicable to this Case.

The Federal statutory investiture of exclusive tribal court jurisdiction over adoptions of reservation resident or domiciled Indian children is found within the Indian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. §§ 1901-1963. Subsection 101(a) of the law, 25 U.S.C. § 1911(a), provides in relevant part: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the

[7] E.G., *Williams v. Lee*, 358 U.S. 217 (1959).

reservation of such tribe . . ."[8] In vesting exclusive jurisdiction in the tribal court, the statute also manifests a clear intent that state courts be divested of any comparable adoption jurisdiction that might otherwise be claimed. As is discussed more fully in Part III and IV, infra, general governing principles and prior decisions of this Court suggest that state jurisdiction over such adoptions would nowise lie.

The ICWA responds to a nationwide epidemic of Indian family break-ups by non-tribal public and private agencies that Congress declared, "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). Statistics provided at congressional hearings documented the shocking percentages and patterns of Indian children placements.[9] Consequently the Act

[8] 25 U.S.C. § 1911(a) reads in its entirety:

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Mississippi has been recognized by this Court as a non-Public Law 280 state lacking jurisdiction over the Choctaw Reservation. *U.S. v. John*, 437 U.S. 634 (1978). Regarding the provision on wards of tribal courts, neither child has been declared a ward of the Choctaw tribal court.

[9] Surveys of States with large Indian populations conducted by the Association of American Indian Affairs (AAIA) in 1969

pronounces "that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal Standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . ." 25 U.S.C. 1902. Although the exclusive tribal court adoption jurisdictional provision, 25 U.S.C. § 1911(a), is but part of the comprehensive statutory pattern in implementation of this national Indian policy, it codifies the jurisdiction extant in tribal courts and ascertains that no such concurrent jurisdiction remains residual in

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and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: In Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four Indian children under one year of age was adopted.

The disparity in placement rate for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 per cent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Cong. & Ad. News 7530, 7536.

state courts. Except in Mississippi the statute presumably serves as an effective shield against covert jurisdictional incursions into "Indian Country" and tribal reservation populations.[10] It therefore stands as the primary bulwark to the closest and most fundamental of tribal relationships and cultural involvements; that of reservation existence.

The Mississippi courts' decisions, however, would seek to remove this protective shield against covert state jurisdictional incursions into "Indian Country" and tribal reservation populations by fashioning special state requirements for residence and domicile of minor children apart from that of their natural parent(s). That approach disregards the legislative history and intent of the ICWA, established principles of federal Indian law and decisions of other courts interpreting the question.

III. MISSISSIPPI COURTS' REQUIREMENTS OF PHYSICAL PRESENCE WITHIN AND PARENTAL CONSENT TO CHILDREN'S ACQUISITION OF THEIR PARENTS' RESIDENCE AND DOMICILE UNLAWFULLY INFRINGE UPON THE SPECIAL FEDERAL/TRIBAL RELATIONSHIP WHEN APPLIED TO INDIAN CHILDREN OF RESERVATION PARENTS.

The Mississippi courts' rationale in support of their determination of state jurisdiction over these Indian adoptions suffers from what might best be termed a

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[10] Given the confidentiality of adoption proceedings, the possibility cannot be absolutely ruled out that other states are secretly granting adoptions of reservation Indians under circumstances similar to those of this case. Neither can it be verified that Mississippi has not granted other such Indian adoptions and published its most recent standard for minor's residence and domicile only upon appellate challenge.

"forked jurisprudence." The court below initially identifies its operative variable for deciding jurisdiction saying: "The key language on which the case at bar turns is the requirements [sic.] that the Indian child reside or be domiciled within the reservation of the tribe." 511 So. 2d at 921. In a swift mixing together of issues of fact with issues of law, however, the court then observes that "At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Id.

By claiming a factual observation as its legal basis of departure, the court below disregards its own most recent prior pronouncement of caselaw on minors' residence or domicile—*In Re Guardianship of Watson*, 317 So.2d 30 (Miss. 1975). In the *Watson* case the court had firmly maintained:

> The law is unchallenged that the residence of a minor is that of his parents and remains so during the period of minority in spite of the temporary absence at school or elsewhere. (317 S.2d at 32.)

The court below's opinion also quickly dispatches Appellant's reliance upon the same rule of law in two prior cases—*Boyle v. Griffin*, 84 Miss. 41, 36 So. 141 (1904); and *Stubbs v. Stubbs*, 211 So.2d 821 (Miss. 1968) by claiming distinguishabilities questionable in their probative worth.[11]

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[11] Regarding *Boyle* the Mississippi Supreme Court explained: "the thrust of that case was towards a determination of the inability of their children therein to change their domicile from that of their parents during their minority, and, if the parents changed their domicile, that of the children follows it." 511 So.2d at 921. Yet the two children, Algie and Elmer Tryon, whose lawful domicile was at issue in *Boyle* were adjudged to have acquired their father's Memphis, Tennessee domicile notwithstanding that they had never left the State of Mississippi.

The court hailed *Stubbs* as precedent for its holding that intent is one determinative factor in establishing domicile; yet there involved was ones intent to establish ones own residency and domicile rather than disestablishing ones child's as would otherwise be affixed by common law.

The subtlety of the court below's mixture of fact for law might go unnoticed and unchallenged, but for the reoccurrence of a past practice; that of attempting the application of state laws to Indians on reservation. Barely a decade ago this Court had occasion in *United States v. John*, 437 U.S. 634 (1978) to reject attempts of Mississippi's courts to criminally prosecute a Choctaw father and son under state law on charges arising from an incident occurring on the Choctaw Reservation. This Court unanimously held that the lands collectively comprising the Choctaw Reservation in Mississippi constitute "Indian County" as defined in 18 U.S.C § 1151(a) and as used in 18 U.S.C. § 1153 and that these federal statutes operated to preclude state exercises of criminal jurisdiction over the Indian accused.

This Court has also stated that the federal "Indian Country" definition governing applications of federal criminal jurisdiction generally apply also to questions of federal civil jurisdiction and to tribal jurisdiction. *DeCoteau v. District Court*, 420 U.S. 425, 427 n.2 (1975). See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976)

The cumulative surmisal from these authorities is, clearly, that Mississippi courts lack power to apply Mississippi's laws, whether statutory or decisional and

whether criminal or civil, to tribal Indians within the limits of the Choctaw Reservation.

The issue beclouds in noting that the state courts below adjudicated the residence and domicile of Indian children *of the reservation*, by divesting under state law their residence and domicile *within the reservation.*[12] Nonetheless, the operative effect is the same in that it constitutes an application of state law to Indians and to their status at state law on reservation

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[12] Actually, the opinion is unclear as to whether it is determining initially that the children do not qualify as reservation residents and domiciliaries and are thereby enabled to be adopted in state court, or whether it is determining initially that the children qualify concurrently as Mississippi residents and domiciliaries and as such are enabled to be adopted in Mississippi's courts.

The latter approach, whether characterized as a State's Rights or as an individual Indian's Rights theory, was flatly dismissed when this Court wrote in *Fisher v. District Court*, 427 U.S. 382, (1976):

> "Finally we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 471 U.S. 535 (1974)
>
> (424 U.S. 390-391.)

(The remainder of this brief is premised on the ›rmer proposition of the lower courts opinion.)

in disregard of the *John* ruling and other precedent of this Court. See, e.g., *Fisher v. District Court*, 424 U.S. 382 (1976). Furthermore, in the *Fisher* decision this Court cast grave and possibly fatal doubt on the ability of state courts to rule on adoptions such as these *sub judice* in the first instance, and that additional claim is also raised by appellant. In *Fisher* this Court held that state courts lack subject matter jurisdiction over adoptions of Indian children when all of the parties live on reservation and are all Indians.

Bolstering the "territorial" argument, grounded in *John, supra.*, for rejecting these state court adjudications of non-reservation residency and domicile, is the established "infringement doctrine" of *Williams v. Lee*, 358 U.S. 217 (1959). Under that doctrine the lower court's divestiture, by application of Mississippi law, of these tribal children's reservation residency and domicile status unlawfully impinges upon a specialized area of tribal government. The test of *Williams v. Lee, supra.*, set forth within the context of a decision that an Arizona State Court did not have jurisdiction over a suit brought by a non-Indian store owner on the Navajo Reservation against a Navajo Indian on a debt, is as follows:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.
> (358 U.S. at 220.)

This Court has repeatedly recognized tribal groups as a "separate people, with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); see also *United*

States v. Wheeler, 435 U.S. 313 (1978); and having the power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218 (1897); including, for example, membership eligibility, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916); and reservation adoptions, *Fisher v. District Court*, 424 U.S. 382 (1976).

It is doubtful that many activities exist of more fundamental importance to the right of reservation Indians to make their own laws and be ruled by them than is the right to establish its own standards for reservation residence and domicile—including for its minor children. Clearly the impingement of the Mississippi courts in this case has been in direct violation of the infringement doctrine and of the appellant's tribal sovereignty. It cannot be sustained consistently with established principles of Indian law.

The second branch to the "forked jurisprudence" reflected by the Mississippi Supreme Court's opinion lies in its comment that the children "were voluntarily surrendered and legally abandoned" off the reservation in Harrison County, Mississippi. Seemingly the court below in making this observation was impliedly seeking to invoke the rule of law of abandonment as an exception to the general, common law interpretation that the residence of minor children follows that of the natural parent(s). *See*: 25 *Am.Jur.2d* § 63 (1966) and *Restatement (Second) of Conflict of Laws*, § 22, comment c (1971). Generally if the parents abandon the child then the child acquires the domicile of the party who stands *in loco parents* to him or her and with whom the child was placed with an intent to relinquish all parental rights and obligations.

Notwithstanding the executions of parental consent by the natural parents (JA-9, 12, 18, 20, & 21), abandonment as a matter of law could not consummate at any time prior to the instant of entry of the final decree of termination or of adoption. The reason is that Subsection 103(c) of the Act, 25 U.S.C. § 1913(c) provides:

> (c) *Voluntarily termination of parental rights or adoptive placement; withdrawal of consent; return of custody*
>
> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.
> (25 U.S.C. § 1913(c).)

Since the courts determine jurisdiction in advance of their rendition of a final decree, a determination of reservation domicile would have preceded the consummation at law of any parental intent to abandon.

Another, more recognized approach to the same conclusion that state abandonment law must give way to the application of the ICWA in this case is found in a pre-emption analysis. Pursuant to that analysis, the broad assertion of state regulatory authority over tribal reservations and members may be pre-empted by federal law under the Supremacy Clause of the Constitution, art VI, § 2. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)."Although a State

will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, [this Court has] cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, at 333-334 (1983). "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emptions that have emerged in other areas of the law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976).

Given this heightened standard of preemption applicable to Indian legislation, the question becomes whether the ICWA's provisions operate to preempt application of state abandonment laws which would otherwise change the residence and domicile of these Indian children from that of their natural parent(s) to that of Harrison County, Mississippi.

The Supreme Court of Utah was confronted with a similar posturing in determining the residence and domicile of a nine-year-old Navajo from the Navajo reservation in Churchrock, New Mexico and reached the conclusion that under federal preemption analysis abandonment law could not be applied. Captioned *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah, 1986), the Utah Supreme Court upheld the trial court's finding that the natural mother abandoned the child in Utah. Observing that "[u]nder traditional rules of law Jeremiah's domicile would have changed from the reservation to Utah County at that time", 732 P.2d at 967, the court nonetheless concluded that "state law must bow when the application of that law brings the state and federal policies into conflict. See, e.g. *Perez v. Campbell*,

402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971)." *Id.*

Thus on both tenets of its "forked jurisprudence" the court below has managed to simultaneously befoul its ruling with both barriers to assertions of state regulatory authority over tribal reservations and members which this Court identified and summarized in *White Mountain Apache Tribe v. Bracker, supra*, as follows:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art 1, § 8, cl 3. See *United States v. Wheeler, supra*, at 322-323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, (1965); *McClanahan v. Arizona State Tax Comm'n, supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, (1959). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 502, (1979); *Fisher v. District Court*, 425 U.S. 382 (1976) (per curiam); *Kennerly v. District Court of Montana*, 400 U.S. 423, (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are re-

lated, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan v. Arizona State Tax Comm'n, supra*, at 172 against which vague or ambiguous federal enactments must always be measured.
(448 U.S. 143-144.)

IV. THE DEFINITION OF RESIDENCE OR DOMICILE OF INDIAN CHILDREN FOR PURPOSES OF THE INDIAN CHILD WELFARE ACT TURNS ON A FEDERAL RATHER THAN A STATE DEFINITION.

"Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied." *Williams v. Lee*, 358 U.S., at 220-221 (footnote omitted), as quoted in *McClanahan v. Arizona State Tax Comm'n*, 448 U.S. at 174-175, fn. 3. Clearly, 25 U.S.C. § 1911(a) contains no expressed grant to states of such jurisdiction to define reservation residence and domicile.

Notwithstanding the lack of any expressed conferral of state power to define residence and domicile within the reservation for ICWA purposes, the courts below applied state standards to adjudge the children non-reservation residents and domiciliaries. That action fashioned a claimed ambiguity into the otherwise clear

application of federal law defining residence and domicile. Appellant regards the applicable statute in this case as reasonably clear and free from doubt but to the extent that any doubts or ambiguities should exist in 25 U.S.C. § 1911(a), it is well established that they are to be resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). The Court has applied this rule to favor federal protection and tribal self-government over competing state jurisdiction. *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976); *McClanahan v. Arizona Tax Com'n*, 411 U.S. 164, 174-175 (1973); see *United States v. Kagama*, 118 U.S. 375, 384 (1886). "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-144.

The ruling below also ignores the legislative history to the ICWA. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Cong. & Ad. News 6530, 7540-75. That legislative history notes of the Section 101(a), 25 U.S.C. § 1911(a), provision that it "confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation" see H.R. Rep., No. 1886, 95th Cong., 2d Sess. 21, reprinted in 1978 U.S. Cong. and Ad. News, at 7544,—and cites among other cases; *Wisconsin Band of Potowatomies v. Houston*, 393 F. Supp. 719 (D.W.D. Mich., 1973). In that case a Wisconsin probate court's jurisdiction was overturned notwithstanding that an uncle had sought custody of the Indian children there after their parents' off-reservation deaths. Though

mother and children had in previous months lived in various off-reservation locations, the parents were not legally separated and the father's last permanent residence was on reservation. The court held that the children acquired the residence and domicile of their natural father and ruled that, as regards the uncle's petitioning of the probate court, the actions of an individual Indian "cannot create subject matter jurisdiction of Indian affairs in a state court." 393 F.Supp. at 733.

The ICWA underwent various rewrites before final passage. One early draft introduced before Congress on November 4, 1977, explains, as regards that portion enacted in altered form as Section 101(a), that "For purposes of this Act, an Indian child shall be deemed to be a resident of the reservation where his parent or parents *** is resident." *124 Cong. Rec.*, Part 19, at Page 37,224 (Nov. 4, 1977). Notwithstanding considerable redrafting and an extensive record of investigation and testimony to the final passage, nowhere can there be found any indication that any standard other than this federal interpretation apply.

Since passage of the Act, cases directly passing on the "resides or is domiciled" language of Section 1911(a) have included *In Re: Appeal in Pima County, Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (C.A. Ariz., 1981); *Matter of Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (C.A.N.M., 1985) and *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) (discussed in Part III, supra). In the first of these two cases, an Assinaboine mother, herself a 15-year-old minor, gave birth out-of-state and executed a voluntary relinquishment for preadoption placement. The court traced the mother's, and thus

the child's, domicile to Montana in the following manner:

> Appellant [mother], an unemancipated minor, was domiciled within the Fort Belknap reservation in Montana as that was the domicile of her father. *** Her illegitimate child, however, took the domicile of her mother. * * * The domicile of an infant born out of wedlock remains that of its mother until a new one is lawfully acquired. * * * Although the child was living in Arizona with the prospective adoptive parents pursuant to a temporary custody order, its domicile had not yet been legally changed and therefore it was a domiciliary of the reservation in Montana. (Citations omitted.) 635 P.2d 187, at 191.

In the second case, *Matter of Adoption of Baby Child, supra*, the Pueblo mother of an illegitimate child attempted to place her child for adoption off-reservation through the New Mexico courts. The natural father and the Pueblo ultimately obtained state court dismissal for lack of subject matter jurisdiction on the grounds that an illegitimate child takes the domicile of its mother at the time of its birth. (*Halloway, supra*, as mentioned in Part III, also upholds reservation residence and domicile.)

Rulings of this Court have indicated in other contexts as well that state definitions should not apply when to do so would frustrate the purposes of federal statutes. In *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923), this Court wrote, for example, that:

> The law of the United States cannot be evaded by the forms of local practice ***. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.
> (263 U.S. at 21.)

Also in *Dice v. Akron, Canton & Younstown R.R. Co.*, 342 U.S. 359 (1959), this Court also held:

> Congress * * * granted petitioner a right * * * State laws are not controlling in determining what the incidents of this Federal right should be.
>
> (342 U.S. at 361.)

Applications of state definitions for residence and domicile would produce unworkable results. For example, to the extent the court below may have defined "non-reservation residency" it has potentially opened its courtroom doors under the state adoption statute, Section 93-17-3 Miss.C.Annot., to adoptions of Indian children nationwide upon their off-reservation birth. If, instead, a state's ability to define reservation residency and domicile extended only to reservation lands within its state boundaries, multi-state reservations such as the Navajo reservation would have those living within its boundaries subject to varying status' depending on their physical presence (or non-presence) at any given moment. For tribes with migratory reservation populations the results would be impossible.

Circumstances considered, the only practicable means for "the establishment [and maintenance] of

minimum Federal standards" (25 U.S.C. § 1902) through this otherwise comprehensive federal Indian legislation is by the recognition of federal standards of reservation residence and domicile. Only through the conduit of federal law, which recognizes tribal laws, *See, e.g. Williams. v. Lee*, 358 U.S. 217, can the fullest possible implementation be effected of the panapoly of rights, privileges, responsibilities and protections of our Indian children provided by this comprehensive enactment.

CONCLUSION

The Opinion below ignores federal statutes, numerous controlling decisions of this Court and is at odds with accepted principles of federal Indian law. The decision should be reversed and remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX

§ 93-17-3. Who may be adopted—who may adopt—venue of adoption proceedings—change of name.

Any person may be adopted in accordance with the provisions of this chapter in term time or in vacation by an unmarried adult or by a married person whose spouse joins in the petition, provided that the petitioner or petitioners shall have resided in this state for ninety (90) days preceding the filing of the petition, unless the petitioner or petitioners, or one of them, be related to the child within the third degree according to civil law, in which case such restriction shall not apply. Such adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child shall have been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any owned by the child. Should the doctor's certificate indicate any abnormal mental or physical condition or defect, such condition or defect shall not in the discretion of the chancellor bar the adoption of the child if the adopting parent or parents shall file an affidavit stating full and complete knowledge of such condition or defect and stating a desire to adopt the child, notwithstanding such condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" herein shall be construed to refer to the person to be adopted, though an adult.

Sources: Laws, 1973, ch. 361, § 1, eff from and after passage (approved March 23, 1973).

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibilities to Indian people, the Congress finds—

(1) That clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibilities for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes, than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in Indian tribe.

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have

often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1911 Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either

parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.